

1 MR. SCHMIDT: Yes. We have. We
2 have gotten favorable carriage, more favorable
3 than what Comcast gives us.

4 JUDGE SIPPEL: Did you give up any
5 equity to get it?

6 MR. SCHMIDT: No. We did with
7 Dish TV, with Dish and DirecTV. There was an
8 equity component to those deals.

9 JUDGE SIPPEL: Yes.

10 MR. SCHMIDT: I think the
11 testimony was the equity ended up being part
12 of the deal to get rid of the free period we
13 were otherwise going to give them for
14 carriage. There was equity in those deals but
15 not in the other deals.

16 When Mr. Orszag looks out across
17 the marketplace, and he looks at everybody,
18 Comcast is more than 50 percent below the
19 marketplace.

20 The fact that we have to give
21 equity to Comcast to get carriage proves the
22 point that we are making. The fact that the

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1 only difference we are talking about between
2 our channel and the channels they give
3 favorable carriage to is equity proves the
4 point that they are engaging in
5 discrimination. And there is always an
6 explanation for every one of those
7 circumstances. Hockey was different for this
8 reason. Golf was different for this reason.
9 Versus was different for this reason. When
10 they were all struggling, even when Tennis
11 Channel was launched, when Golf and Versus
12 were struggling, when they were literally, Mr.
13 Carroll talked about sudden expectations, they
14 made Versus a new channel. They changed the
15 name. They changed the programming.

16 JUDGE SIPPEL: They explained why.
17 But I don't need to get an explanation why.
18 I said they gave an explanation why. I don't
19 want to belabor that one. I just want to back
20 up a little bit now.

21 My questions to you were all in a
22 hypothetical. You know, I am looking to see

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1 what gets pushed and what doesn't get pushed.
2 And this is not a case in which Comcast was
3 insisting on equity in order to give you what
4 you wanted.

5 MR. SCHMIDT: That's correct.

6 JUDGE SIPPEL: Okay. I wanted to
7 be sure that that is clear. That has got to
8 be a starting point.

9 I am going to be simply saying is
10 supposing it had been part of the factor --
11 well you know. I am going to just repeat what
12 I said unnecessarily.

13 MR. SCHMIDT: If it had been, it
14 would be a violation. We don't know what
15 would have happened if equity would have been
16 proposed.

17 They did not -- Let me be more
18 precise than the answer I just gave. They did
19 not insist on equity as a condition for
20 carriage in terms of saying to us you need
21 equity. But our point, the point of our
22 lawsuit is that that is what they insist on.

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1 That because they don't have equity, they
2 don't give us the parity, the perfect word
3 Your Honor hit on, the parity that they give
4 their channels where they do have equity.

5 So there wasn't a demand for
6 equity in the sense that give us equity or
7 else but there was a demand for equity in the
8 sense that the facts tells us, the record
9 tells us that absent that equity we would
10 carry by them much lower than anyone else,
11 than the marketplace carries us and with that
12 equity, they get carried much better. Their
13 channels get carried much better by them than
14 the rest of the marketplace.

15 JUDGE SIPPEL: Okay. But it would
16 not be illegal for Mr. Solomon to go in there
17 in 2009 and say we will offer you some equity
18 in addition to the money.

19 MR. SCHMIDT: No. That would not
20 be illegal.

21 JUDGE SIPPEL: Okay.

22 MR. SCHMIDT: But to hinge

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1 carriage on that would be exactly what Section
2 616 is for.

3 JUDGE SIPPEL: I recognize that.
4 I am just saying I want to be sure that we,
5 particularly me, are clear on this.

6 Okay. Let me just stop that right
7 there and let me ask Mr. Carroll, do you have
8 anything to say about this, what he has just
9 been talking about?

10 MR. CARROLL: About his equity
11 point?

12 JUDGE SIPPEL: About Solomon.
13 Well even about the credibility issue. I
14 mean, he is saying that --

15 MR. SCHMIDT: Which I would like
16 to finish, Your Honor.

17 JUDGE SIPPEL: Well, let him
18 finish it and then you can respond. I'll give
19 you a little time.

20 MR. CARROLL: Okay, thanks.

21 MR. SCHMIDT: There is, in our
22 view, a contrast in credibility and it was hit

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1 on in some of the questions. And let me touch
2 very briefly on it. We frankly, didn't hit
3 this very hard in our papers because we want
4 this to be about the record. We want this to
5 be about the facts, not about Mr. Carroll and
6 me taking shots. But let me talk about some
7 of the challenges their witnesses presented.

8 JUDGE SIPPEL: Yes, go right
9 ahead.

10 MR. SCHMIDT: Mr. Egan in *Wealth*
11 TV, Mr. Carroll trumpets his opinion in *Wealth*
12 TV. The fact is, he applied to methods in
13 *Wealth TV*, the genre analysis and the look and
14 feel analysis. He actually conceded in this
15 case that he also did not apply the look and
16 feel analysis in this case at page 1599 and
17 1600 of the transcript.

18 He applies a methodology in *Wealth*
19 TV that shows those channels to be dissimilar.
20 When he comes into this case, he can't use
21 those methods anymore so he makes up something
22 new.

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1 And we heard that throughout his
2 testimony where Your Honor would ask him
3 questions and he would say, well my brother-
4 in-law told me this is what he thinks of
5 fishing, or something remarkably similar to
6 what Mr. Carroll said when he said my
7 daughters would tell you that there is a
8 difference based on how hip the channel is.
9 That is the level of evidence that Mr. Egan
10 had, where he had one method in *Wealth TV* that
11 Your Honor relied on. It didn't work here so
12 he came up with a new method.

13 Ms. Gaiski and Ms. Gaiski's notes,
14 Mr. Carroll equated that to his accusation
15 that Mr. Herman made up the advertising
16 visits. It is completely for this reason. It
17 is different because we know that Ms. Gaiski
18 went to the Comcast lawyer and asked how do I
19 handle this. And then when she wrote up her
20 notes, she wrote "work product" on them. By
21 definition, she was anticipating litigation,
22 which at least strongly indicates she knew how

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1 this was going to come out. It was going to
2 come out with a denial and that would lead to
3 litigation. That is why it said "work
4 product" on that and we know that from the
5 manner she did the field test.

6 Comcast had told its field you
7 have to control costs, that you can't do it by
8 eliminating costs for a very expensive Golf
9 and Versus. You can only do it with the
10 independents. And then it said to them, do
11 you want to pay extra costs for Tennis
12 Channel. And they said not really. Not when
13 those are the ground rules.

14 And they didn't even wait to hear
15 back. They had the call. They told the
16 field, come back to us if you have any photo
17 reaction. The very next day before the field
18 could come back, they rejected Tennis
19 Channel's offer.

20 Now those present a question as to
21 whether that was a legitimate business test or
22 a litigation test. We think it was a

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1 litigation test right down to the fact that it
2 involved counsel and said "work product" at
3 the top of the document. There is no evidence
4 like that with respect to Mr. Herman's
5 advertising efforts. He was doing his
6 business.

7 Mr. Bond says it is all about
8 cost. We don't dispute that Comcast cares
9 about cost when it is paying money to channels
10 it doesn't own. Our point is that it doesn't
11 apply that test to its own channels. Yet when
12 we asked Mr. Bond do you consider cost for
13 your channels, he repeatedly said no. Page
14 2277 of the transcript: "You didn't actually
15 do any cost-benefit analysis of that sort, did
16 you, sir? No." This is talking about Golf
17 Channel.

18 "Did you do any sensitivity
19 analysis on the costs and benefits of
20 distribution in connection with that renewal,
21 sir? No.

22 You also didn't send Ms. Gaiski

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1 out to do a field survey in connection with
2 Versus, did you, sir? No.

3 You also didn't do a cost-benefit
4 analysis at the time for Versus, did you, sir?
5 No."

6 Throughout the testimony, the
7 evidence was striking and it could go on in
8 Mr. Bond's testimony that the problem is not
9 that he consider cost with respect to Tennis
10 Channel, it is that he never considered it for
11 their own channels. That is the essence of
12 discrimination and it goes to the question
13 about men and women. It is okay to say we
14 don't want to pay women a dollar an hour for
15 their work if that is not gender based. But
16 if what you are saying is, we only want to pay
17 them 70 cents because it costs us too much to
18 pay them a dollar but we never asked that
19 question for the men, we just paid them the
20 dollar. That is discrimination and that is
21 what the record shows happened here. They
22 paid themselves. They applied tests to Tennis

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1 Channel that they don't apply to their own
2 channels. And Mr. Bond was strikingly clear
3 about that. Ms. Gaiski was strikingly clear
4 about that. That is the essence of
5 discrimination.

6 JUDGE SIPPEL: Okay.

7 MR. SCHMIDT: I had one more point
8 I wanted to make but if Mr. Carroll is going
9 to respond --

10 JUDGE SIPPEL: Go right ahead.
11 No, go right ahead.

12 MR. SCHMIDT: Well Your Honor in
13 the order gave us the last word, and if I
14 could go through my career having the last
15 word once with Mr. Carroll, --

16 JUDGE SIPPEL: Make your point.

17 MR. SCHMIDT: -- that will be an
18 accomplishment. So, let me let him make his
19 response.

20 JUDGE SIPPEL: You do not have to
21 prove this. The burden of proof --

22 MR. SCHMIDT: Yes, since he has

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1 the burden --

2 JUDGE SIPPEL: Go right ahead.

3 MR. SCHMIDT: The only other point
4 I wanted to make, Your Honor that was very
5 striking from Mr. Carroll's comments is the
6 real chasm that exists between the parties on
7 what the law says.

8 Mr. Carroll said two things that I
9 wrote down because I thought they were truly,
10 truly remarkable. One was you were allowed to
11 promote the companies you own. That is the
12 essence of Section 616 is you can't do that if
13 you are not doing that -- You can't do that in
14 terms of carriage if you are not doing that
15 for the companies you don't own. You can't
16 apply a standard for the companies you own if
17 you don't apply the same fair standard for the
18 companies you don't own.

19 At one point talking about Time
20 Warner, he said why should my client be held
21 to a different standard. Because his client
22 made the choice to be vertically integrated.

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1 His client made that choice and, having made
2 that choice, has to follow the law. And the
3 law says when you are vertically integrated,
4 you have to treat the two the same. You have
5 to give them parity. Section 616 requires
6 that.

7 The facts in *Wealth TV* and *MASN*
8 didn't support a Section 616 finding because
9 there wasn't substantial similarity in those
10 cases. We have proved from Comcast's own
11 documents the substantial similarity.
12 Comcast's Exhibit 66, where they call Golf
13 Channel and Versus comps of Tennis Channel;
14 Tennis Channel Exhibit 82, where they call
15 Tennis Channel a competitive network; Tennis
16 Channel 143, where they talk about them having
17 the same demographics; or 108 where they make
18 the same point; Exhibit 108 they also in their
19 advertising they have similar, that Tennis and
20 Golf have similar appeal in terms of
21 advertising and audiences. Professional
22 tennis is similar to the PGA in its appeal,

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1 lending itself not to large audiences but
2 rather to dedicated viewers with higher
3 financial means, education, and sophisticated
4 lifestyle.

5 That is exactly contrary to what
6 Mr. Carroll argued. That is Comcast's own
7 documents going on and on about the similarity
8 between them.

9 What the law says, what Your Honor
10 said in *Wealth TV* is that is a showing of
11 discrimination. This is paragraph 63 from
12 Your Honor's decision in *Wealth TV*, talking
13 about how a showing of discrimination can be
14 made. "The litigant can make that showing by
15 direct evidence such as statements showing a
16 discriminatory intent or by circumstantial
17 evidence, such as an uneven treatment of
18 similarly situated entities."

19 That similarly situated didn't
20 exist in *Wealth TV*, where you had them in
21 entirely different spaces with entirely
22 different demographics. I didn't exist in

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1 MASN where you were talking a channel that
2 showed Orioles and Nationals games trying to
3 force its way into a North Carolina market,
4 based on a news channel there that happened to
5 show basketball games.

6 It does exist here on these facts,
7 in light of the evidence that we showed and
8 the concessions that Comcast's own witnesses
9 made. And when you couple up that similarity
10 and that differential treatment and all the
11 other facts, that shows discrimination.

12 Let me close on the remedy that we
13 are asking for. As I alluded to a moment ago,
14 Your Honor hit exactly the right word. I
15 spent last week and the week before preparing
16 for this and reading the transcript and going
17 through the documents and struggled to come up
18 with the right word. And parity is exactly
19 the right word for what we seek.

20 JUDGE SIPPEL: You and Mr.
21 Carroll, could have exchanged notes on all of
22 this reading you did.

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1 MR. SCHMIDT: He was on vacation
2 when I started my process but I could have
3 caught up with him when he got back.

4 But here is why parity is so
5 important. If Comcast carries itself better
6 than anyone else in the market carries it, and
7 that is what Mr. Orszag said, that if you look
8 at its carriage of its channels versus the
9 market, it is better.

10 Section 616 says we are entitled
11 to that same benefit. If Comcast decides to
12 drop its channels to the sports tier, we are
13 not thrilled to be there with them but at
14 least we have parity. At least we are subject
15 to fair competition, which is what Section 616
16 is intended to give.

17 We know that is not going to
18 happen because we know from their witnesses
19 that thought has never crossed their mind.
20 Mr. Barnes said that on the stand. He has
21 never once thought of dropping their channels
22 to the sports tier because that is not how

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1 they treat their own channels. That is what
2 we ask for in this litigation and that is what
3 Section 616 gives. Parity.

4 JUDGE SIPPEL: Well you don't want
5 to have Versus and Golf join you on the sports
6 tier. You don't want that.

7 MR. SCHMIDT: We prefer to be
8 lifted up but we wouldn't have a claim if they
9 were brought down to our level. And we would
10 be better off because we would be competing
11 fairly.

12 JUDGE SIPPEL: Really?

13 MR. SCHMIDT: Absolutely. They
14 wouldn't get the benefits of the largest cable
15 company in the country giving them carriage
16 that is better than anyone else in the country
17 gives them and we have to compete with them
18 for viewers, for advertisers, for even tennis
19 programming. We would at least get fair
20 treatment.

21 Obviously, we want to be lifted up
22 with them and we think that is what the

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1 outcome would be here if Your Honor ruled in
2 our favor because the evidence is clear they
3 have never thought about dropping their own
4 channels down. But we have to be very candid.
5 We wouldn't have a claim if they put their
6 channels on the sports tier and then we would
7 be receiving parity.

8 JUDGE SIPPEL: That is like the
9 story about the two farmers. One farmer had
10 a brand new pig. It was a great big pig. And
11 the second farmer couldn't afford one. And a
12 fairy queen came along and said well you have
13 got one wish. What do you want? He said I
14 want his pig dead.

15 (Laughter.)

16 MR. SCHMIDT: I don't think
17 Comcast is saying kill their pig. The
18 evidence is that they will not kill their pig.

19 JUDGE SIPPEL: Okay. Can I just
20 leave it like this? I already asked you.

21 MR. CARROLL: Am to understand you
22 just compared my client to the pig in that?

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1 JUDGE SIPPEL: No, no, no.

2 MR. CARROLL: Your Honor --

3 JUDGE SIPPEL: I mean I guess I
4 should have used dinosaur. Dinosaur would
5 have been better.

6 MR. CARROLL: Look, I think there
7 is a huge difference between us in what we
8 think the law is.

9 JUDGE SIPPEL: Don't worry about
10 that. It is the credibility. This is the
11 stuff that gets me.

12 MR. CARROLL: On credibility, I
13 invite you to read Mr. Solomon's transcript at
14 the cross. You several times even had to
15 comment on the record can I get an answer to
16 this. You are not answering the question.
17 And there was a reason for that that comes out
18 when you are reading the transcript.

19 JUDGE SIPPEL: I've got three
20 daughters so you know, I know how to do that.

21 MR. CARROLL: Well I mean, chased
22 him on the leverage. I chased him time after

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1 time. And the equity for carriage was just,
2 well it is just painful, frankly, to go
3 through it because it is so clear it was an
4 equity for carriage deal as our notes say
5 that.

6 I think you have got enough on
7 this record. I just think that when you go
8 back to the transcript, it is pretty clear
9 what is in the record and what is not.

10 I don't agree with how he is
11 reading Rigdon but you can cite it to the
12 testimony and you can see it for yourself.

13 JUDGE SIPPEL: Okay.

14 MR. CARROLL: And Your Honor, I
15 thank you on behalf of our side for all the
16 hard work and patience the Court has already
17 put into this and the job still ahead.

18 MR. SCHMIDT: That is where we
19 join and I will try to seize the last word.

20 JUDGE SIPPEL: I am going to have
21 to hear from the Bureau first.

22 MR. SCHMIDT: Well let me seize

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1 the last words to Mr. Carroll. We also thank
2 the Court very much for all the efforts the
3 Court has made throughout this proceeding,
4 including the further chance to discuss the
5 evidence today.

6 And we also thank Ms. Gosse and
7 Ms. Bergold for their work on this case and
8 their accomplishments.

9 JUDGE SIPPEL: It is a hardworking
10 team. Isn't it?

11 MR. SCHMIDT: Absolutely.

12 JUDGE SIPPEL: Thank you very
13 much. That is very much appreciated.

14 Now, some things were said about
15 the Bureau.

16 MR. OSHINSKY: Your Honor, we
17 haven't heard anything here today that changes
18 our position. We feel exactly as we did --

19 JUDGE SIPPEL: No, no, no. I
20 mean, do you want to say anything about it?
21 I'm not asking you to change your position.

22 MR. OSHINSKY: We would agree that

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1 we don't run a cable company.

2 (Laughter.)

3 JUDGE SIPPEL: Is that what they
4 said?

5 MR. CARROLL: How about that they
6 shouldn't be running a cable company?

7 JUDGE SIPPEL: They didn't say
8 that. Well they didn't say that. Well the
9 government ran a couple of auto companies that
10 did okay they said. I don't know.

11 All right. That's it. That's it.
12 I'm sorry. I didn't want to get you out in
13 100 degree weather but that might happen.

14 Thank you very much. We are in
15 recess until further order or my ID.

16 (Whereupon, at 12:43 p.m., the
17 foregoing matter was adjourned.)

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Tennis Channel v Comcast Cable Communications

Name of Hearing

MB DOCKET NO. 10-204

Docket No. (if applicable)

445 12th STREET, S.W., WASHINGTON, D.C.

Place of Hearing

July 12, 2011

Date of Hearing

We, the undersigned, do hereby certify that the foregoing pages, numbers 2815 through 3010, inclusive, are the true, accurate and complete transcript prepared from the reporting by John Mongoven (Reporter's Name) in attendance at the above identified hearing, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing or conference.

July 12, 2011

John Mongoven

Date

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